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IN THE

Supreme Court of the United States

October Term, 1980

RALEY'S, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

RETAIL CLERKS UNION, LOCAL 588 UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO,

Intervenor.

Petition for Writ of Certiorari to Urited States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. What standards are to be applied to determine whether statements of opinion lose First Amendment protection and may properly be treated as coercive promises?

2. What standards are to be applied to determine when speech alone warrants the issuance of a bargaining order?

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The petitioner, Raley's, Inc., respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on November 2, 1979.

Citation to Opinion Below.

The decision of the Court of Appeals, not yet reported in the Official Reports, is printed in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 2, 1979. A timely petition for rehearing was denied on February 28, 1980. This Petition for Certiorari was filed within the time period set by the Court pursuant to its Order Extending Time. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved.

Section 8(c) of the National Labor Relations Act and the First Amendment to the Constitution which are both set forth in the Appendix hereto.

Statement of the Case.

Raley's, Inc., the petitioner herein, operates retail supermarkets throughout Northern California, with its corporate offices located in Sacramento, California. All retail clerk supermarket employees are represented by affiliate locals of the United Food and Commercial Workers Union, including Retail Clerks Union, Local 588, the intervenor before the court below. (P. 16-17.)[1]

Local 588 commenced an organizing campaign among petitioner's corporate clerical employees in July, 1976. The

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[1] "P" references are to the record in the Court of Appeals reproduced as "Volume I, Pleadings."

Union filed its election petition with the National Labor Relations Board on July 14, 1976. A secret ballot election was held on October 20, 1976, which resulted in a majority vote against union representation.

Petitioner did not campaign against the Union until September, 1976, when it sent three letters to the affected employees. Neither the Union nor the Board contended these letters were in any way violative of the National Labor Relations Act, hereinafter the Act.

On October 14 and 15, 1976, three months after the election petition was filed, petitioner conducted four separate meetings among the employees eligible to vote. (P. 20.) Petitioner stated to the employees that the purpose of the meetings was to explain all existing company benefits and to answer any employee questions about those benefits. (P. 8, 25, 27, 51.) Before reviewing benefits, petitioner advised the employees that it could make no promises or commitments under the law. This statement was frequently repeated throughout each of the meetings and in particular, in response to employee complaints about wage rates and other requests for changed benefits. (P. 22, 23, 24, 33, 52.) In further response to employee complaints about rates of pay, petitioner responded only that its wages were "average" or "competitive", and that they would remain competitive in the future. Finally, the employees were told of the company's existing open-door policy wherein employees could and had taken complaints to various of petitioner's officials. (P. 17, 21, 24, 25, 34, 35.) Petitioner made no changes in any of its benefits, including wages, prior to the October 20, 1976 election.

As previously noted, the employees voted against union representation on October 20, 1976. On November 12, 1976, petitioner announced new wage rates for its office employees.

The Union filed objections to the results of the election and shortly after the wage increases were implemented also filed unfair labor practice charges. The objections and complaint on the unfair labor practice charges were consolidated for hearing before Administrative Law Judge Kennedy. After hearing, the Administrative Law Judge dismissed the unfair labor practice complaint, found the election objections to be without merit, and recommended certification of the election results. Upon review, the Board found that petitioner had called the employee meetings for the purpose of soliciting grievances; that it had made implicit if not explicit promises to raise wages by describing current and future rates as "competitive" or "average"; that by declaring its intent to prevent any coercive threats by its Chief Accountant it had promised a benefit, and finally, by announcing the pre-existing open-door policy, petitioner created a new benefit for some employees, even though others had previously availed themselves of it. On these facts and the later grant of wage increases during the pendency of the election objections, the Board ordered petitioner to recognize and bargain with the Union. The Board Order was enforced by the Ninth Circuit.

REASONS FOR GRANTING THE WRIT.

The Ninth Circuit's decision in this case raises the substantial questions of what standards should be applied to determine when statements of opinion lose First Amendment protection and become coercive promises, and further, what standards should be used to determine when speech alone warrants the issuance of a bargaining order. The petitioner contends that the standards adopted by the Court below are in direct conflict with federal labor policy favoring vigorous debate in union campaigns and the First Amendment.

The applicable guidelines for balancing employee and employer rights as set forth in Sections 8(a)(1) and 8(c) of the Act have been articulated by this Court in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). However, the facts before the Court in those consolidated cases involved only threats of retaliation and not alleged promises of benefit. Accordingly, this Court did not examine what types of statements may properly be construed as promises of benefit and thereby lose the protection of the First Amendment or Section 8(c). The critical question of what kind of speech constitutes a coercive promise within the meaning of Section 8(c) was left undecided. This issue, in a day when campaign rhetoric has gone far beyond the realm of unabashed threats, has an impact on every unorganized employer's ability to communicate with its employees and to express its views on existing benefits and labor relations policies.

Since this Court's decision in *NLRB v. Gissel Packing Co., Inc., supra*, the Board has become mired in a morass of conflicts as to the appropriate standards to be applied in evaluating whether the mere holding of employee preelection meetings constitutes improper grievance solicitation which thereby creates an irrebuttable presumption of implied

promises to improve benefits. In *I.T.T. Telecommunications*, 183 NLRB 1129 (1970), the Board held that the solicitation of employee grievances was not in and of itself illegal unless accompanied by express or implied promises of benefits. Thereafter, in *Capitol Cement*, 191 NLRB 419 (1971), *Sportscoach Corp.*, 203 NLRB 145 (1973); *Mead Corp.*, 211 NLRB 657 (1974); *Rustcraft Broadcasting Co.*, 214 NLRB 29 (1974), and *Flint Provision Co.*, 219 NLRB 523 (1975), the Board held that the installation of a suggestion box, inquiries as to what employees were unhappy about, as well as their problems, and inquiries as to why employees wanted a union, along with assurances that problems could be worked out, were not illegal solicitations because they were not followed up by or accompanied with any promise of benefit.

A diametrically different approach, without reversing *I.T.T. Telecommunications, supra*, was adopted by the Board in *Reliance Electric Co.*, 191 NLRB 44 (1971), *affirmed* 457 F.2d 503 (6th Cir. 1972), and *Ken McKenzies, Inc.*, 221 NLRB 489 (1975), wherein the Board held that the solicitation of grievances creates an inference that the employer is impliedly promising to satisfy employee complaints. This intra-Board conflict has never been resolved. Indeed, the view adopted by the Board in the current case and affirmed by the Ninth Circuit is not shared by the Third Circuit Court of Appeals. *Landis Tool Co. v. NLRB*, 460 F.2d 23 (3rd Cir. 1972), *cert. denied* 409 U.S. 915 (1972); *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160 (3rd Cir. 1977). This is not an issue to be brushed aside by reliance upon the substantial evidence test. Rather, proper statutory construction is required.

Stated otherwise, the Board and the Ninth Circuit have adopted a *per se* rule that pre-election employee meetings are called to solicit grievances and further, that such solic-

itation implies a positive employer response. This result constitutes a dangerous infringement of First Amendment rights. A determination of these rights is not reserved exclusively for the Board as it requires substantial statutory construction to establish the parameters of First Amendment rights in election cases.

The Ninth Circuit's view that the Board drew proper inferences from petitioner's mere holding of an employee meeting is a gross misapplication of longstanding First Amendment principles. The issue is not whether there was substantial evidence to support the inferences drawn by the Board, but whether in the first instance the Board's statutory construction of free speech rights will have the effect of severely hindering vigorous debate in union election campaigns in derogation of longstanding federal labor policy.

Nearly every employer involved in a union organizing campaign communicates with its employees as to the current level of benefits so that all employees are aware of what is provided without the need for a union. Hardly an election goes by where employees fail to raise questions or complain about current benefits in such election meetings. Recognizing these well-settled facts, the Board held in *Uarco, Inc.*, 216 NLRB 1 (1974), that any inference of increased benefits may be specifically negated by repeated "no promise" responses to the employees' questions and complaints. *Uarco, Inc., supra*, has not been reversed. In the instant case, the Ninth Circuit held that petitioner's "no promise" pledge was negated by implied promises. This kind of gag order was rejected in *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245 (5th Cir. 1978), and *Robbins & Myers, Inc. v. NLRB*, 577 F.2d 382 (6th Cir. 1978). This conflict should be resolved so as to assure there is meaningful dialogue between employees and employers rather than abject silence which is the necessary result of the holding herein.

The issuance of a bargaining order where employees voted against union representation in the absence of any coercive conduct is the harshest remedy available to the Board. Its repercussions are far-reaching and impose serious burdens on all parties. The Ninth Circuit concluded that petitioner's characterization of current wage rates as "competitive", "average" or "on a par" with other employers and its announcement that various employee problems had been solved in the past and that alleged threats to discharge for protected activity would be controlled, justified the issuance of a bargaining order. This holding is in conflict with *NLRB v. General Telephone Directory Co.*, 602 F.2d 912 (9th Cir. 1979) and *NLRB v. Chatfield-Anderson Co.*, 606 F.2d 266 (9th Cir. 1979). More specifically, in *Chatfield-Anderson*, the employer had (1) interrogated employees; (2) threatened economic reprisals; (3) imposed stricter work rules; (4) withheld contemplated raises; (5) promised improved economic benefits and retroactive wages; (6) threatened to prolong negotiations; and (7) announced a new grievance resolution system. The Ninth Circuit concluded that a fair rerun election could be held. This serious conflict involving minor gradations of unfair labor practices, unless resolved by this Court, will result in a grievous miscarriage of justice for petitioner and its employees.

A substantial question is raised as to whether pre-election speech, absent other unfair labor practice conduct, may properly form the basis for a bargaining order and if so, what standards should be applied where the speech does not contain any implied threats. The impact of threatening remarks, as opposed to simple responsive electioneering, is far easier to identify, witness the Board's absolute quandary over whether mis-statements of fact may form the basis for overturning election results. *Hollywood Ceramics Co., Inc.*, 140 NLRB 221 (1962); *Shopping Kart Food Markets, Inc.*,

228 NLRB 1311 (1977); *General Knit of California, Inc.*, 239 NLRB No. 101 (1978).

The Ninth Circuit's view in the instant case is in conflict with that of the Fourth Circuit's recent decision in *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979). There, the Court refused to enforce a bargaining order where the offenses involved only minor Section 8(a)(1) transgressions. Moreover, the Ninth Circuit's holding is contrary to *NLRB v. Gissel Packing Co., Inc., supra*, and has resulted in a substantial erosion of employer First Amendment rights to be heard, and, of equal significance, employee rights to listen, be informed and evaluate.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PATRICK W. JORDAN,
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Counsel for Petitioner,
Raley's, Inc.

APPENDIX A.

Copy of the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Raley's Inc., Petitioner, v. National Labor Relations Board, Respondent, and Retail Clerks Union, Local 588, Retail Clerks International Union, AFL-CIO, Intervenor. No. 78-2398.

[November 2, 1979].

Appeal from the National Labor Relations Board.

Before: DUNIWAY and ELY, Circuit Judges, and FITZGERALD*, District Judge.

The Decision and Order of the National Labor Relations Board is reported at 236 NLRB No. 97 (1978). The Board, reaching a finding contrary to that previously made by an Administrative Law Judge, held that Raley's, the employer, had committed an unfair labor practice in connection with a certification election, thereby violating Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. Sections 158(a)(1) and (5). The Board further determined that the involved union did, in fact, represent a majority of the employees in the bargaining unit and ordered the employer, upon request, to recognize and bargain with the union. Raley's has petitioned for review, and the Board has cross-petitioned for enforcement.

A Board order will be upheld if there is "substantial evidence" in the record to support it. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Unless questions of testimonial credibility are implicated, the standard of review does not change simply because the Board decision is at

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*The Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

variance with the findings of an Administrative Law Judge. *Loomis Courier Service, Inc. v. NLRB*, 595 F.2d 491, 495-6 (9th Cir. 1979); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 409 (9th Cir. 1978); *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1347 (9th Cir. 1978). *Cf. Nelson v. Interior Board of Land Appeals*, 598 F.2d 531, 533-4 (9th Cir. 1979).

Our resolution of the cause does not depend upon an assessment of the relative credibility of witnesses, but rather, upon the inferences that may be drawn from uncontested evidence. We have concluded that the Board's decision is appropriately based on reasonable inferences derived from undisputed facts. The decision is therefore supported by "substantial evidence." Accordingly, we reject the contentions advanced by Raley's in its Petition for Review and grant the Cross-Petition of the Board.

The Board's Order will be ENFORCED.

APPENDIX B.

Amendment I to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX C.

United States Code, Title 29, Section 158(c).

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.